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In the Supreme Court of the United States

October Term, 1978

EDWIN T. BULL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable: The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Edwin T. Bull, prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals entered in this cause.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported, Slip Opinion 77-2259 and has been separately filed as a Joint Appendix with other Petitioners involved in the cause. The Order of the Seventh Circuit denying the defendant Edwin T. Bull's Petition for Rehearing was unpublished, however a copy of that Order is included in the Joint Appendix.

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing was entered on April 23, 1979. This Court's jurisdiction is invoked under Title 28 U.S.C. Paragraph 1254(1). This Petition for Writ of Certiorari is filed within 30 days of that order.

QUESTIONS PRESENTED FOR REVIEW

1. Whether mutually exclusive defenses required severance and to the extent that the Court of Appeals sustained the District Court's refusal to sever these defendants were they deprived of a constitutional right to a fair trial.

2. Whether having refused severance of mutually exclusive defenses, does the further restriction of cross-examination of the government's principal witness to one defendant, satisfy the rights of confrontation, cross-examination and effective assistance of counsel of the remaining admittedly antagonistic co-defendants.

3. Whether a defendant's Fifth Amendment right to due process of law, as defined by this Court in *Brady* v. *Maryland* is violated where, despite a specific pretrial request from the defendant, the prosecutor intentionally withholds clearly exculpatory evidence from the defendant until the opening statement of the government's case.

CONSTITUTION AND RULE INVOLVED

FIFTH AMENDMENT—Constitution of the United States

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT—Constitution of the United States

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 14, Federal Rules of Criminal Procedure

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the

court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

As amended Feb. 28, 1966, eff. July 1, 1966.

STATEMENT OF THE CASE

On June 28, 1976, an indictment was filed in the United States District Court for the Northern District of Illinois, Eastern Division. The indictment charged Frederick B. Ingram, E. Bronson Ingram, Valentine Janicki, Chester Majewski, Bart Lynam, Franklin H. Weber, this petitioner Edwin T. Bull and Robert F. McPartlin with violations of Title 18 USC, §§2, 31, 1343 and 1952 and Title 26 USC, §7206(1).

There were 39 counts charging all defendants, in substance, with conspiracy, promotion of bribery through Interstate Commerce, and the use of Interstate communications in a scheme to defraud. Income Tax violations were also charged as to certain of the defendants, other than this petitioner, Edwin T. Bull.

The trial commenced on September 6, 1977, and was concluded on November 17, 1977. The jury returned a verdict of guilty as to Bull on Counts 1 through 31, except that a verdict of not guilty was returned in Counts 2, 5 and 32.

The defendants Frederick Ingram, Valentine Janicki, Franklin Weber and Robert McPartlin were also found guilty on various counts. The defendants E. Bronson Ingram, Chester Majewski and Bart Lynam were found not guilty.

FACTS

The Petitioner accepts the statement of facts as stated in the Opinion in the United States Court of Appeals for the Seventh Circuit. These are to be found at Pages 2 through the first portion of Page 11 of the Joint Appendix filed herein.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO DELINEATE THE STANDARD TO BE APPLIED TO THE GRANT OR DENIAL OF RELIEF UNDER RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WHERE CO-DEFENDANTS ADVANCE ANTAGONISTIC AND MUTUALLY EXCLUSIVE DEFENSES.

II. TO ANSWER THE IMPORTANT CONSTITUTIONAL QUESTION WHICH WAS SPECIFICALLY LEFT OPEN BY THIS COURT'S DECISION IN BRADY v. MARYLAND, UNITED STATES v. AGURS AND WEATHERFORD v. BURSEY: THIS CASE PROVIDES THE COURT WITH THE OPPORTUNITY TO DECIDE THE PRESENTLY UNANSWERED QUESTION AS TO WHAT STAGE OF A CRIMINAL PROSECUTION DOES THE PRINCIPLE OF DUE PROCESS OBLIGE A PROSECUTOR TO DISCLOSE HIGHLY EXCULPATORY EVIDENCE.

I.

The government's theory was that Valentine Janicki, Chester Majewski, Bart Lynam, Franklin H. Weber, Edwin T. Bull, and Robert F. McPartlin, as the "Chicago Defendants" received payments of money as bribes to influence the award of the contract in favor of the Ingram Corporation. The Ingram Corporation was not named as a defendant, but its two principal officers and owners Frederick B. Ingram and E. Bronson Ingram were named defendants. It was also asserted that the Chicago Defendants received further payments to modify the contract given by the Chicago Sanitary District to Ingram. The alleged payments

were, according to the government, paid by Frederick Ingram to one William J. Benton, Vice-President of the Ingram Corporation, who was an unindicted co-conspirator and the key witness for the prosecution. Benton was conducting negotiations for the Ingram Corporation in Chicago, and allegedly paid over these monies to the various "Chicago Defendants". The defense proffered by Frederick and Bronson Ingram (The Ingram Defendants) was similar to that of the prosecution: The Ingrams admitted the payments but contended they were not bribes, but were payments made out of fear of economic harm. In essence, the Ingrams claimed that they were victims of extortion (Tr. 3934-3937). Their defense sharply conflicted with that of the remaining defendants that no payments, whether characterized as bribe or extortion, were ever made.

The prospect that the trial would involve mutually exclusive and completely antagonistic defenses was made known to the trial court during the pretrial motions stages. The "Ingram Defendants" initially filed a severance motion which stated specifically that the defenses were severely in conflict. A supplemental memorandum stated that the "Ingram Defendants" intended to prove "the reputation of Chicago public officials for requiring illicit payments in connection with public contracts . . . ." Finally, in their renewed motion for severance, the Ingrams advised the trial court that they had made payments to the "Chicago Defendants' as part of an extortion scheme that was "conceived, devised and implemented throughout by the Chicago Defendants". In addition, the "Ingram Defendants" asserted that they would prove their case through both their own and the government's witnesses, and that "their posture throughout the case would be the prosecution of the Chicago Defendants".

The Ingram Defendants, consistent with the representation made in their pretrial motions for severance, "cross-examined Benton with the intent to support the government's theory of the case, reiterating that payments were made by Benton to the "Chicago Defendants" (Tr. 1455-1458). At the close of their cross-examination of Benton, all the Chicago Defendants moved for severance which was denied (Tr. 1505). Following the completion of Ingram's cross-examination of Benton, the trial court restricted the extent to which the other defendants would be allowed to cross-examine Benton:

> "Let me make clear that there will be no repetition and there will be not any exhaustive detail about these extra curricular activities of his (Benton's) either.[1] It is out, and I think it is out in sufficient detail, unless there is something new, some new transaction that has not been gone into. So whatever Mr. Neal has covered, do not get the idea that anybody else is going to cover the same fraud with just a little different slant to it because I will not permit that." (Tr. 1505-1506)

Despite the stated intention by the Ingrams to prosecute the "Chicago Defendants" the trial court imposed the Ingram cross-examination [2] of this critical witness upon them. The interest of the Ingrams in the defalcation of their trusted employee and officer was circumscribed to a function of demonstrating him an unreliable witness. The inter-

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[1] The government revealed for the first time in the opening statement that Benton had admitted keeping over $375,000 of the money given to him by the Ingrams for delivery in Chicago. The trial court's directive therefore, precluded defense counsel from further exploring the various aspects of Benton's lifestyle—expensive homes, cars, etc.—an inquiry necessary to determine if Benton was in severe need of this money, and if so, if he had kept a greater portion, if not all of the money than he had admitted.

[2] Mr. Neal was the attorney for one of the Ingrams who was acquitted.

est of the "Chicago Defendants" was a demonstration of an unrelated scheme by Benton to embezzle large sums from his employer on the pretext of their—the "Chicago Defendants"—demands. The admission by Benton of his diversion of that $375,000 was the opening wedge to the expansion and development of that interest, consistent with their theory of defense, and antagonistic to the theory of Mr. Neal's defense of his client. This restriction completely deprived the "Chicago Defendants" of their constitutional right to "effective assistance of counsel". It was tantamount to binding them by the government's cross-examination.

During its rebuttal case, the government offered evidence that Frederick Ingram had been involved in another bribery scheme involving a Brazilian public official. (Tr. 5665-5666) The Ingram Defendants objected to the admission of this evidence as being highly prejudicial. The Chicago Defendants also objected to this evidence since the scheme to which Ingram had been involved at an earlier date as to the Brazilian official paralleled exactly the government's case against the Chicago Defendants, and lacked all probative value in respect of their intent. Essentially, the Chicago Defendants argued that this evidence was irrelevant and highly prejudicial to them, and that a limiting instruction by the trial court to the effect that the evidence should only be considered as to the Ingram Defendants would be insufficient. This objection was overruled. The opinion of the Court of Appeals for the Seventh Circuit is in direct conflict with that of other Circuits. See for example *United States* v. *Johnson,* 478 F.2d 1129, 1131-1132 (Fifth Cir. 1973).

In addition, the Court of Appeals for the Seventh Circuit stated that:

> "Even if the defenses of the Appellant (the Ingram Defendants) were to a degree antagonistic, it would not follow that there should have been two or more trials." (App. 13)

Yet, it is clear that should the jury have believed that the Ingrams were extorted, and therefore innocent, it could not have believed the Chicago Defendants' contention that they neither received nor asked for any money from the Ingrams. The Court of Appeals responded to that argument by stating that:

> "As Benton admitted to retaining some of the money in issue, it was possible for the jury to believe that the Ingrams were extorted and did attempt to pay money over to the Chicago Defendants while simultaneously believing that the Chicago Defendants neither requested nor received any such monies."[3]

The problem which the Court ignored, however, is that no contention was ever made by the Chicago Defendants or the government at the trial below that Benton kept all of the monies that he was paid by the Ingrams; thus, some of the money had to have been paid over to the Chicago Defendants, if the defense of the Ingrams was to be believed. The Court's speculation into an alternative rationale that the jury could have used to avoid seeing these defenses as mutually exclusive, where no such similar speculation was engaged in by any defendant at the trial below as well as the Court of Appeals' own finding that these defenses were not mutually exclusive, again raises issues which the Petitioner believes present unique questions of law for this Court.

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[3] The Court, thus, upholds a conviction on an untenable fiction. If it were possible for a jury to believe the Chicago Defendants did not request any such monies, by whom was the jury to simultaneously believe the Ingrams were extorted? Certainly the law must reject what logic repels.

Petitioner urges that this case offers this Court a clear opportunity to delineate the standard to be applied in granting severances where co-defendants advance defense theories as antagonistic as were argued in the trial below.

II.

The question here is whether a defendant's constitutional right to due process of law under the Fifth Amendment is violated when a prosecutor intentionally fails to disclose until the government's opening statement highly exculpatory evidence, despite a specific pretrial defense request for such information.

Prior to trial, the Chicago defendants filed motions under *Brady* v. *Maryland,* (373 U.S. 83) (1963) for the disclosure of evidence favorable to the defendants. A *Brady* motion was also filed on behalf of the Ingram Defendants and adopted by the Chicago Defendants. The Ingram motion requested, inter alia, materials showing that "Benton took funds and property from Ingram Corporation or any of its subsidiaries", and materials showing "that during the time he was employed by Ingram Corporation, and unknown to Frederick B. Ingram or E. Bronson Ingram, Benton took substantial payments, in property or cash, from third parties". The government resisted this request. In a Minute Order dated October 22, 1976, the trial judge denied the defendant this specific request for discovery for information relating to any defalcation made by Benton.

In its opening statement, the prosecution for the first time disclosed that Benton, "The intermediary between the Ingrams and the Chicago Defendants and the one who had informed the Ingrams of the alleged demands for money from Chicago had admitted to keeping $375,000 of the money that the Ingrams had given to him for purposes

of paying the Chicago Defendants" (Tr. 48). Benton had made reference to these monies before the grand jury on April 28, 1976, but had misrepresented the facts so as to prevent the grand jury from realizing that he had stolen this money. The government also revealed that it had known for almost two years prior to trial that Benton had embezzled funds (Tr. 238).

That this exculpatory evidence had not been made known to the defense prior to trial was immediately brought to the trial court's attention (Tr. 52, 106, 221-231). After a lengthy colloquy, the trial court agreed that the information with respect to Benton's defalcation was *Brady* material (Tr. 224). However, the trial court then stated that had he known that this was the type of defalcation to which the defendants were referring in the specific *Brady* requests, he would have granted the motion (Tr. 247). All of the defendants made alternative motions at this juncture for judgment of acquittal, dismissal of the indictment, the barring of Mr. Benton from testifying, or a recess for a reasonable length of time to pursue additional investigation (Tr. 249). All of these motions were denied (Tr. 250). In addition, on September 19, 1977, seven days after the disclosure of this material and one day prior to the Chicago Defendants' cross-examination of Benton, the trial court restricted the scope and the extent of all defense cross-examination of Benton, as more clearly appears hereinbefore.

The Seventh Circuit in its opinion in this case noted that the fact Benton had kept this money made it conceivable that he kept all of it (App. 12-13). Unfortunately what the Seventh Circuit failed to realize was that the defendants, because of the late disclosure of the evidence, were unable to effectively present to the jury that very defense. First, as the disclosure came on the first day of trial, none

of the defense counsel had time to conduct a thorough investigation to determine if Benton had, indeed, kept all of the money, or to develop evidence making it probable or possible he had, and, thus, reasonable doubt as to the guilt of the Chicago Defendants. Parenthetically it should be noted that it would be well nigh impossible for these attorneys who were litigating the case every day for nine weeks to conduct the investigation in their free time concerning Benton's activities throughout the world as developed through his testimony, and that is the alternative offered by the Seventh Circuit.

Second, the trial court denied motions for continuance for the purpose of making that very type of investigation. Finally, before defense counsel could attempt to explore the possibility that Benton kept all of the money through cross-examination of Benton himself, the trial court imposed a restriction on that line of questioning.

Thus, all of these factors combine to prevent the defendants from effectively presenting what is admitted by all of the parties, to be the most logical and effective defense that was available to them.

Despite the Seventh Circuit recognition of the value of the potential defense that was effectively taken from the defendants as a result of the prosecution's suppression of the exculpatory evidence and the trial court's ruling with respect to exploration of that evidence at trial, the Court of Appeals still ruled that the defendants' due process rights to a fair trial were not violated. The Seventh Circuit stated that *Brady* addresses a thoroughly different problem than that presented in the instant case and it held that the standard is whether the disclosure came so late as to prejudice the defendants. It then went on to hold that the disclosure did not come so late in the case as to preju-

dice the defendants, because it could conduct mid-trial investigation. The Seventh Circuit has, in effect, disinterred "Trial By Surprise", nullifying the years of effort that precipitated the burial.

It seems clear that if a defendant is going to be provided with full due process protection which was outlined by this Court in *Brady,* articulable standards would require a prosecutor to turn over obvious *Brady* material as soon as he was aware of it. The Seventh Circuit's decision is strange in the light of its own recent pronouncement in *McDonald* v. *State of Illinois,* 557 F.2d 596 which held "a defendant's right to prepare the best defense he can and to bring the court's attention any evidence helpful to . . . (his case) is constitutionally protected."

Clearly in the instant case, the defendants were unable to exercise this most important right to prepare the best defense available to them. Existing ABA standards require this very thing:

> "The prosecutor should (make these disclosures) as soon as practical following the filing of charges against the accused." ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL, PARAGRAPH 2.2(a) (Approved Draft, 1970)

In the absence of the pronouncement of a clear articulable judicial standard, mandating performance of the constitutional duties of a prosecutor with respect to disclosure of *Brady* material, it is doubtless that this type of trial by ambush exhibited in the instant case will continue. As a result, the adversary system will degenerate into a type of "poker game" that this court has often counseled against. See *Wardius* v. *Oregon,* 412 U.S. 470; *Williams* v. *Florida,* 399 U.S. 78.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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